(22)

XI-HC—78

22/12/07

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr. A. No. 731/2002 सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

| आदेश का दिनांक तथा आदेश क्रमांक | हस्ताक्षर सहित आदेश | कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश |
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APPELLANTS (In Jail)

1. Mannu, S/o Tijau Lodhi, aged about 40 years.
2. Fatima, W/o Bashir Khan, aged about 40 years.

Both resident of Khairi, Thana Chuikhadan, Distt. Rajnandgaon (Chhattisgarh).

-Versus-

RESPONDENT

State of Chhattisgarh, Through Police Station Chuikhadan, Distt. Rajnandgaon.

(Criminal Appeal under Section 374(2) of the Cr.P.C.)

Division Bench :

Hon'ble Shri L.C. Bhadoo &
Hon'ble Shri Sunil Kumar Sinha, JJ

17-12-2007

Shri Rajneesh Shrivastava, Advocate appears on behalf of Shri Shailendra Dubey, counsel for appellant No.1 Mannu.

Shri Anoop Mazumdar, counsel for appellant No.2 Fatima Bi.

Smt. Anju Ahuja, Dy. Govt. Advocate for the State/respondent.

Heard.

Oral judgment dictated on *dais*.

L.C. Bhadoo, J

By this appeal under Section 374(2) of the Code of Criminal Procedure the appellants have questioned the legality and correctness of

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the judgment of conviction and order of sentence dated 26-6-2002 passed by the Special Judge, Rajnandgaon in Sessions Trial No.124/2001 whereby and whereunder learned Special Judge after holding the accused/ appellants guilty for commission of offence under Sections 364, 302 & 201 of the Indian Penal Code, sentenced each of the accused to undergo imprisonment for life & to pay fine of Rs.10,000/-, in default of payment of fine to further undergo R.I. for one year, to undergo imprisonment for life & to pay fine of Rs.10,000/-, in default of payment of fine to further undergo R.I. for one year and to undergo R.I. for three years & to pay fine of Rs.5,000/-, in default of payment of fine to further undergo R.I. six months, respectively.

2) Case of the prosecution, in brief, is that Mangtin Bai, mother of deceased Ashok had illicit relations with Basir Khan, husband of accused/ appellant Fatima Bi. Therefore, both the ladies used to quarrel on that ground and Fatima Bi asked Mangtin to leave the village. Once Fatima Bi threatened her that she will commit the murder of her child. Thereafter one day Ashok (since deceased) took the cows to the field. The mother of the deceased namely, Mangtin Bai left for the site where the relief work was going on and left the keys of her house in the neighbourhood. When the boy (Ashok) did not return to the house, search was made in the village by the villagers. Accused/appellant Mannu had not participated in that search. He absconded from the village since Friday and he had kept animosity against the father of the deceased. When the whereabouts of Ashok were not known, search was made by Netram, Sarpanch Manohar & Kotwar Vikram Das in the house of accused Mannu. The dead body of Ashok was

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found in the kothi of house of Mannu wrapped with clothes. When ~~the~~ whereabouts of Ashok was not traceable, missing report (Ex.P/12) was lodged by Savant, father of the deceased on 15-2-2001. Dehati Nalishi (Ex.P/1) was lodged by Savant on 18-2-2001 at 19.15 hours in Police Station Chuikhadan. Dehati merg intimation (Ex.P/2) was also given by Savant on the same day i.e. 18-2-2001 at about 19.00 hours. When body of Ashok was found on 18-2-2001 in the house of Mannu, the Investigating Officer after giving notice (Ex.P/3) to the Panchas, prepared inquest (Ex.P/4) on the body of Ashok. Caste certificate ~~had~~ was obtained from the Tahsildar under Ex.P/6. Site plan (Ex.P/7) where body of Ashok was found i.e. in the kothi of house of Mannu was prepared by the Investigating Officer on 21-2-2001. One tea shirt & half pant of Ashok were seized under Ex.P/8. Accused Mannu gave memorandum under Ex.P/9 to the Investigating Officer on 21-2-2001 regarding the place where the body of Ashok was concealed. Ex.P/10 was memorandum given by co-accused Fatima Bi regarding the place where the body of Ashok was concealed. Blood stained & plain soil was seized from the place of occurrence under Ex.P/11. The body of deceased was sent for postmortem examination to Government Hospital, Chuikhadan where Dr. Ashok Khare (PW-20) conducted postmortem. He opined that the cause of death was asphyxia due compression of neck and chest. Postmortem report is Ex.P/13.

3) After completion of investigation, charge sheet was filed in the Court of Additional Chief Judicial Magistrate, Khairagarh, who in turn committed the case to the Court of Special Judge, SC/ST Act, Rajnandgaon.

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4) In order to establish the charge against the accused persons, the prosecution examined 20 witnesses. Statements of the accused persons were recorded under Section 313 of the Code of Criminal Procedure in which they denied material appearing against them in the prosecution evidence and pleaded ignorance.

5) Learned Special Judge after hearing counsel for the respective parties, convicted and sentenced the accused persons as aforementioned.

6) We have heard learned counsel for the parties and perused the record.

7) Learned counsel for the appellants have not disputed the homicidal death of Ashok. Moreover, Dr. Ashok Khare (PW-20) has stated that on 19-2-2001 he was working as Block Medical Officer at Government Hospital, Chuikhadan. On that day, the body of Ashok, S/o Savant was brought for postmortem examination. On postmortem, he found that neck of the deceased was rotating and body was putrefied. There was a cracking sound from survical bone. There was an injury of black colour in the middle of neck in the size of 1" x ½" on the right side and the other injury in the size of 2" x 3" x 4" on the left side of neck. There was an abrasion in the size of 1" x 1/6" on the lower side of right knee. Abrasion on the right side of face in the size of ¼" x 1/6". On dissection, clotted blood was present on both sides of neck. Hyoid bone and thyroid bone were fractured. 3rd & 4th ribs of right side and 3rd, 4th & 5th ribs of lefts side were fractured. Neck and windpipe were reddish. Food pipe was reddish in

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colour. Hyoid bone was broken vertically. There was a fracture in the 3rd & 4th survical vertebra. Ligaments were fractured. All the injuries were ante mortem in nature and caused by hard & blunt object. The cause of death was asphyxia, as a result of compression of neck & chest and injury to survical vertebra. The death was 5-7 days old. Postmortem report is Ex.P/13. In view of the medical evidence and postmortem report, it is established that the death of Ashok was homicidal in nature.

8) As far as complicity of the accused/appellants in the crime in question is concerned, there is no direct or ocular evidence in this case in order to connect the accused persons with the crime in question. The whole case rests on the circumstantial evidence. In order to rest the conviction based on the circumstantial evidence, in the matter of **Dhananjoy Chatterjee Vs. State of W.B.** reported in **(1994) 2 SCC 220** the Apex Court held that :

> "In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can

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form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof."

9) Having heard learned counsel for the parties, we have scrutinized the evidence and the judgment of trial Court. The prosecution has tried to establish the involvement of the accused persons with the crime in question based on the following circumstances:

1. Dead body of Ashok was found in the kothi of house of accused Mannu.
2. Accused Mannu was absconding since missing of deceased Ashok.
3. There was a strained relationship between the accused Fatima Bi and the mother of the deceased.

10) **First circumstance :** As far as this circumstance is concerned, body of Ashok was recovered under Ex.P/4 i.e. inquest. The Investigating Officer who prepared the inquest report has not been examined. PW-19 B.L. Dhruv, Additional Superintendent of Police, has simply stated that he prepared site plan Ex.P/7, which bears his signature. He has stated that he recorded statements given by accused Mannu & accused Fatima Bi under Ex.P/9 & Ex.P/10, respectively. But he has not stated that what memorandum & what information was given by accused Mannu under Ex.P/9 and by accused Fatima Bi under Ex.P/10. He has not stated that the site plan (Ex.P/7) was prepared at the instance of the accused persons as pointed out by them. Therefore, the evidence of this witness is of no help in order to establish that the site plan where the body of Ashok was

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found, was pointed out by the accused persons that at that place they kept the body. Even he has not stated that from which place and at which point the body was located. There is no evidence of any Investigating Officer regarding the seizure and discovery of body from the place. There is not an iota of evidence on record that when search was made in the house of Mannu, whether that house was locked, whether the lock was opened in presence of the independent witnesses & whether the key of that lock was seized from Mannu or from any other person to whom he handed over the key.

11) Even PW-1 Savant, father of the deceased, in para-4 of his evidence, has categorically stated that Mannu and his family members are residing at Nagpur since long and they are earning their livelihood there only. Very often they come to their village and after seeing their field, they used to return to Nagpur. PW-4 Maniram has stated that search of the house of Mannu was made by the Police and the body of Ashok was found in his house. But, in cross-examination, he has stated that whatever evidence is given in examination-in-chief has given on the basis of what he heard in the village. Apart from that, this witness is a witness of site plan and his statement under Section 161 of the Cr.P.C. was not recorded.

12) PW-5 Netram, in para-3 of his evidence, has stated that after the report Police came in the village. They searched the house of Fatima Bi, but nothing was found in her house. As Mannu was absconding, therefore, no search was made. In para 5 of cross-examination, he has stated that the son of Mannu used to reside in Nagpur and Mannu used to go there for

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earning his livelihood. PW-5 has also stated that body of Ashok was found in the house of Mannu on 18-2-2001, but he has not stated that the house was locked and that was not accessible to anybody else. Therefore, his evidence is of no value in order to establish that the place where the body was found was in exclusive possession of Mannu.

13) PW-7 Ishwari has also stated in cross-examination that next day after missing of Ashok the police came in the village. It is correct that two sons of Mannu are residing at Nagpur. He does not know as to whether Mannu used to go to Nagpur to meet his sons. It is correct that when the body of Ashok was found in the house of Mannu on that day nobody was present at the house of Mannu and presently the wife of Mannu is in village. In view of the evidence of Ishwari, when the search was made in the house of Mannu no family member of Mannu was present and that was deserted.

14) Even PW-8 Mangtin Bai, mother of the deceased, has stated in cross-examination that on the date of incident Mannu was residing at Nagpur and was earning his livelihood there. His family members used to reside with him in Nagpur. Police brought Mannu after the incident. Even though PW-14 Ramgulal, is brother of accused Mannu, but he has been examined by the prosecution. He has also stated that Mannu along with his family members used to reside in Nagpur in order to earn his livelihood and he used to visit village. PW-16 Amrit Bai, wife of accused Mannu, has also stated that they are residing in Nagpur for the last 18-20 years and they are earning their livelihood there.

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| | 15) There is not an iota of evidence on record to establish that the day on which deceased Ashok disappeared or during these days when Ashok disappeared, accused Mannu was seen in the village. There is no evidence, as has been mentioned earlier, that when the search was made in the house of Mannu, the house was locked and the lock was opened in presence of Panchas after breaking open the same or after taking the key from anybody to whom Mannu handed over the key. There is no evidence that the place from where the body of Ashok was retrieved was not accessible to the general public. Therefore, in view of the above evidence, the prosecution has not been able to establish that the place from where the body of Ashok was retrieved was exclusively within the possession of Mannu and that was not accessible to anybody else. Even the memorandums Ex.P/9 & Ex.P/10 said to have been given by Mannu & Fatima Bi in order to point out the place from where the body of Ashok was retrieved have not been established by the prosecution. Investigating Officer, B.L Dhruv (PW-19), has also not proved these documents. Moreover, these documents have no sanctity in the eye of law for the reason that the body of Ashok was already retrieved on 18-12-2001 and that place was known to everybody. Thereafter such memorandum losses its importance because that place was known to everybody, then it cannot be said that the place was exclusively within the knowledge of accused persons, because on 18-12-2001 Dehati Nalishi & merg were given by the father of the deceased so that places were known to everybody since 18-12-2001 whereas, the memorandums of these accused persons were recorded on 21-12-2001. Therefore, there is no clinching legal evidence | |

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available on record to establish that the place from which the body of Ashok was retrieved within the exclusive possession of accused Mannu, that was not accessible to anybody else and the place from where body was retrieved was pointed out by the accused persons.

16) **Second circumstance:** As far as this circumstance is concerned, as per the evidence of prosecution witnesses as discussed earlier, even the parents of the deceased have stated that accused Mannu along with his family members used to reside in Nagpur in order to earn their livelihood. There is no evidence that Mannu was seen in the village on the day when Ashok disappeared or nearby those days in the village. Therefore, it cannot be said that Mannu was absconding after commission of crime. Mannu was brought from Nagpur where he was residing along with his family members, then how can it be held that he was absconding. The prosecution has failed to establish this circumstance.

17) **Third circumstance:** As far as this circumstance is concerned, PW-1 Savant, husband of Mangtin Bai & father of the deceased, has not stated that there was any animosity between his wife and accused Fatima Bi on account of the fact that his wife was having relationship with the husband of Fatima Bi. PW-4 Maniram, in examination-in-chief, has stated that there was a commotion in the village about the quarrel between Fatima Bi and wife of Savant i.e. Mangtin Bai, but in cross-examination, this witness has stated that he deposed before the Court whatever he heard from the villagers. Therefore, his evidence to the extent that there was a quarrel between Fatima Bi & Mangtin Bai is improvement. Even though

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PW-5 Netram has stated that since last 2-3 months there was a quarrel between accused Fatima Bi & Mannu, but in cross-examination, he has stated that he disclosed this fact to Police, if the same is not written in police case diary statement, then he cannot assign any reason. This fact is not mentioned in police case diary statement, as such this is an improvement in the Court evidence. Therefore, there is no cogent and clear evidence to establish that there was any animosity between Fatima Bi & Mangtin Bai to the extent of taking the life of son of Mangtin Bai.

18) PW-8 Mangtin Bai, mother of the deceased, has stated that Fatima Bi used to quarrel with her on the ground that she has some relation with her husband and she said that she would kill her child. In para 5, she has again stated that about 8 days before the incident Fatima Bi quarreled with her. In para 7, she has stated that she made a complaint to police about threatening given by Fatima Bi, but no such report has been placed on record. Moreover, when threatening was given by Fatima Bi to Mangtin Bai then why this fact was not mentioned by the father of the deceased in the missing report Ex.P/12 that Fatima Bi had grudge against his wife on account of her relationship with the husband of Fatima Bi. Even this fact has not been mentioned by Savant, father of the deceased, when he gave Dehati Nalishi (Ex.P/1) dated 18-2-2001. Therefore, there is no clear cut clinching evidence to establish that there was any animosity between Fatima Bi & Mangtin Bai.

19) For the foregoing reasons, the prosecution has not been able to bring on record in circumstantial evidence to connect the accused persons

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with the crime in question. As far as accused Fatima Bi is concerned, there is no evidence to establish that anybody saw her taking away the deceased. Even search of her house was made, but nothing was detected, no evidence has been brought on record in order to connect her with the crime in question. The prosecution has also not been able to bring on record legal clinching circumstantial evidence to establish that the accused persons were the authors of the crime in question. Therefore, conviction and sentences imposed upon the accused persons cannot be sustained.

20) In the result, the appeal succeeds and same is allowed. Conviction and sentences imposed upon the accused persons under Sections 364, 302 and 201 of the IPC are set aside and they are acquitted of the said charges. It is stated that the accused persons are in detention since 21-2-2001. They be released forthwith unless required to be detained in any other case.

**Sd/-**
**L.C. Bhadoo**
**Judge**

**Sd/-**
**Sunil Kumar Sinha**
**Judge**

Gowri